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August 8, 2005

**MEMORANDUM**

TO: Karen Orlansky, Director  
Office of Legislative Oversight

FROM: Charles R. Loehr, Director   
Montgomery County Park and Planning Department

RE: Responses to Certain Legal Issues Related to OLO's Clarksburg  
Town Center Fact-Finding Review

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Attached please find the Commission's responses to Questions 2, 6, and 7, as set forth in your Memorandum to me dated August 1, 2005, regarding Legal Issues Related to OLO's Clarksburg Town Center Fact-Finding Review.

As agreed upon, responses to the remaining Questions will be forthcoming in a couple of weeks.

DYD:cmd

Enclosures

cc: Adrian Gardner, General Counsel  
Michele Rosenfeld, Associate General Counsel

**Responses to Questions 2, 6, and 7**  
**Legal Issues Related to OLO's Clarksburg Town Center**  
**Fact-Finding Review**

2. **Roles and Responsibilities for Building Permit Review and Issuance.** How do State and County law, regulations, and other governing documents define the roles and responsibilities of the County Government and Planning Board in the building permit review, inspection, and enforcement process? Address whether the Department of Permitting Services, the Department of Park and Planning, or both are responsible for checking whether a building permit application complies with the development standards of the RMX zone.

**Response:** Article 28, § 8-119(a) states, in pertinent part, as follows:

A building or other structure may not be erected or structurally altered in the regional district<sup>1</sup> without the issuance of a building permit, and a permit may not be given except in conformity with the provisions of this article and of the regulations enacted by the respective district councils.<sup>2</sup>

\* \* \* \*

In any part of the regional district in which there does not now exist provision of law or ordinance designating an administrative official by whom building permits are to be issued, the appropriate district council shall designate this official. An act, ordinance, or regulation issued under the authority of this article does not require the approval by the Commission of any building permit in Montgomery County or Prince George's County, and any acts, ordinances, or regulations inconsistent herewith are repealed to the extent of the inconsistency. However, in Montgomery County, all building permit applications shall be referred to the Commission for review and recommendations as to zoning requirements.

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<sup>1</sup> The "regional district" is defined in Article 28 as "The area in Montgomery and Prince George's Counties within the boundaries specified in this title . . . ." Art. 28, §7-102. Section 7-103 defines the "regional district" in Montgomery County as "The entire area of Montgomery County . . . subject to the provisions of § 7-105 of this title." Section 7-105 excludes certain municipal corporations from the regional district. Clarksburg falls within the regional district.

<sup>2</sup> Article 28, § 8-101 states, in pertinent part, that "The County Councils of Montgomery County and Prince George's County are each individually designated, for the purpose of this article, as the district council for that portion of the regional district lying within each county respectively."

(Emphasis added.)

Thus, it is clear that, in Montgomery County, the district council, by enactment of an act, ordinance, or regulation, is required to designate an official who issues building permits. It is further clear that the issuance of a building permit does not require the approval by the Commission and, in fact, any act, ordinance, or regulation that requires the Commission's approval for the issuance of a building permit is expressly repealed to the extent that it requires Commission approval. However, Article 28 does require that all building permit regulations be referred to the Commission for review and recommendations as to "zoning requirements."

Pursuant to Article 28, § 8-119, the Montgomery County District Council did enact a regulation designating an official to be in charge of issuing building permits. Section 8-25 of the Montgomery County Code ("Code") expressly designates the Director of the Department of Permitting Services as that official.

Section 8-25(a) expressly states, in pertinent part, that

The Director<sup>3</sup> must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing and specify the reasons for rejecting it. If the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable.

Section 8-26 is titled "Conditions of permit." Subsection (b) addresses "Compliance with code" and states, in pertinent part, that "Certification by a certified engineer that the plans and specifications are in compliance with this chapter shall be accepted by the director as prima facie evidence that all the requirements of this chapter have been met unless he discovers otherwise." Section 8-24 sets forth what is required in the permit applicant and Subsection (f) specifically requires, among other things, that a "plot plan drawn to scale" show "location, dimensions and proposed use of buildings and other structures for which a permit is requested"<sup>4</sup> and "front and rear yard widths."<sup>5</sup> Thus, these provisions

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<sup>3</sup> Section 8-2 of the Code defines the "Director," as used in Chapter 8 of the Code, as the Director of the Department of Permitting Services. Section 8-25(d) of the Code requires that "The director or his authorized representative shall attach his signature to each permit issued."

<sup>4</sup> § 8-24(f)(4).

require that the applicant provide and certify this information upon which the director may rely “unless he discovers otherwise.”

Subsection (g) of § 8-26 addresses “Compliance with zoning regulations” and states as follows:

The building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59. The issuance of a permit by the Department<sup>6</sup> for the building or structure does not affect an otherwise applicable zoning regulation.

Read together, Article 28, § 8-119 of the State Code and § 8-25 of the County Code make it clear that the Director of the Department of Permitting Services (“DPS”) is the official that has ultimate authority to issue the building permit. Despite the language in Article 28 (State Law) requiring that “all building permit applications be referred to the Commission for review and recommendations as to zoning requirements,” there is no similar language in Chapter 8 of the County Code requiring same. To aid the Director in determining whether to issue a building permit, § 59-D-3.4(c) requires that each site plan must be

- (1) Signed by the applicant agreeing to execute all the features and requirements that are part of the site plan;
- (2) Signed by the chairman of the Planning Board, or his designee, certifying Planning Board approval of the site plan; and
- (3) Forwarded to the Department<sup>7</sup> for reference in issuing building permits under Section 59-D-3.5.

Section 59-D-3.5 states, in pertinent part, that “No sediment control permit, building permit or use-and-occupancy permit may be issued unless it is in strict compliance with an approved site plan.”

With respect to inspections, § 8-17 (Inspection) states, in full, as follows:

- (a) *Preliminary inspection.* Before issuing a permit, the director may examine or cause to be examined all buildings, structures and sites for which an application has been filed for a permit to construct, enlarge, alter, repair, remove, demolish or change the use thereof; and he may conduct such inspections from time to

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<sup>5</sup> § 8-24(f)(5).

<sup>6</sup> Section 8-2 (Definitions) defines “Department,” as used in Chapter 8 of the Code, as “The Department of Permitting Services.”

<sup>7</sup> “Department” is defined in § 59-A-2.1 as “The Department of Permitting Services.”

time during and upon completion of the work for which he has issued a permit; and he shall maintain a record of all such examinations and inspections and of all violations of this chapter.

- (b) *Accredited inspection services.* The director may accept reports of his own inspectors or of approved inspection services which satisfy his requirements as to qualifications and reliability.
- (c) *Plan inspection.* When required by the provisions of this chapter materials or assemblies shall be inspected at the point of manufacture or fabrication.
- (d) *Inspection reports.* All inspection reports shall be in writing and shall be certified by the approved inspection service, or responsible officer of the service or the individual when expert inspection services are accepted. A label or mark of approval permanently fixed to the product indicating that factor inspection has been made shall be accepted in lieu of the aforesaid report in writing.
- (e) *Final inspection.* Upon completion of the building or structure and before issuance of the certificate of use and occupancy as required by this chapter, a final inspection shall be made and all violations of the approved plans and permit shall be noted and the holder of the permit shall be notified of the violations.

The law governing the Commission's inspection process will be addressed in the response to Question No. 9 (Enforcement authority).

With respect to enforcement of building permits, § 8-11 of the Code states that "The Director enforces and administers this Chapter." (Emphasis added.) Sections 8-20 (Stop work order), 8-21 (Revocation of permit), and 8-22 (Violations) set forth enforcement options available to the Director.

The Planning Board's authority to enforce its decisions is found in § 50-41 (Enforcement) of the Subdivision Regulations and provides for enforcement of a "Planning Board Action" which is defined in § 50-41(a)(5), in full, as follows

A final decision, on a preliminary plan, site plan, project plan, supplementary plan, water quality plan or other plan, including all associated terms, conditions, requirements and

other obligations or limitations made by the Planning Board pursuant to its authority under Article 28, Titles 7 and 8, Maryland Code Annotated and Chapters 50 and 59 of the Montgomery County Code including any regulations promulgated pursuant to this authority. A final decision for purposes of this section does not include a decision made by the Planning Board pursuant to Chapter 22A.<sup>8</sup>

Thus, the Planning Board does not have the authority to enforce the issuance of building permits.

6. **Controlling documents for the regulatory approval process.** Define the legal authority of each document (i.e. Planning Board opinions, official project plan document, the signature site plan drawings) that is used to administer the development process after each is approved. How does the authority of each document compare to the authority of the Planning Board's opinion? For example, if the Planning Board's opinion for the project plan has one set of guidelines and the project plan has a different set of more stringent guidelines, which controls? To the extent a project plan, a preliminary plan, or a site plan for the same project address the same issue (for example, building heights) differently, which controls? Legally, do they need to be consistent?

**Response:**

A. Project Plan

Project plans, if required, are the first level of regulatory review by the Planning Board and the review of such applications is governed by Division 59-D-2 of the Montgomery County Code. Project plan review is required "[i]n order to ensure that the development will include the public facilities, amenities and other design features that will create an environment capable of supporting the greater densities and intensities permitted by the optional method of development . . . ." Montgomery County Code § 59-D-2.11. The language of the Zoning Ordinance suggests that the review is intended to be at a conceptual level, with a lesser degree of detail than the subsequently reviewed and approved site plan. For example, the land use plan that an applicant is required to submit must show, among other things, "the general bulk and height of the principal buildings[:]" "[a] preliminary classification of dwelling units . . . [:]" and "[t]he general locations of vehicular and pedestrian circulation systems . . . ." Montgomery County Code § 59-D-2.12(d)(1)-(3) (emphasis added).

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<sup>8</sup> Chapter 22A is Montgomery County's Forest Conservation law.

The Zoning Ordinance requires that the Planning Board issue written opinions to memorialize its action on a project plan. See Montgomery County Code § 59-D-2.7 (stating that the initiation date for commencing the period during which time a project plan must be validated is tied, among other things, to “the date of mailing of the written opinion . . .”). A Project Plan Opinion includes the statutory findings that the Board is required to make in approving a project plan, which findings are listed in Code § 59-D-2.42 (Findings required for approval).

The Zoning Ordinance contains no express requirement concerning the approval of an “official project plan document.” Conflicting information in a Project Plan drawing, which may have been edited after the hearing and is signed “approved” by a staffperson, whether more or less restrictive than the Board’s opinion, does not carry more weight than the opinion, which is a memorialization of the Board’s express action on an application.

B. Preliminary Plan

The Preliminary Plan, in a project requiring project plan review, is the second level of regulatory approval. As with the Project Plan, the Subdivision Regulations require that the Planning Board issue written opinions to memorialize its action on a preliminary plan. See Montgomery County Code § 50-35(h)(1) (stating that the initiation date for commencing the period during which time a preliminary plan must be validated is tied, among other things, to “the date of mailing of the written opinion . . .”). A Preliminary Plan Opinion includes the statutory findings that the Board is required to make in approving a project plan, which findings are included, among other information, in Code § 59-D-2.42 (Preliminary subdivision plans—approval procedure). Among the required findings is that a preliminary plan “substantially conform to the applicable master plan, sector plan or urban renewal plan . . . .” There is no statutory requirement that a preliminary plan conform with a project plan for the proposed development. It is also important to note that the Board does not make a finding concerning the height of a structure when it reviews a preliminary plan of subdivision.

The Subdivision Regulations set forth a process for the handling of preliminary plan drawings. §50-35(g) (Disposition of approved plans). This section provides direction concerning the process involved for incorporating any modifications to the application that have been approved by the Board, minor and substantial. §50-35(g). A preliminary plan opinion, and any requirements and

limitations contained therein, take precedence over a preliminary plan drawing containing information that conflicts with the opinion. Conflicting information in a Preliminary Plan drawing, which may have been revised or altered after the hearing and is signed "approved" by a staffperson, does not carry more weight than the opinion, which is a memorialization of the Board's express action on an application following a public hearing; and, as with project plan opinions, the preliminary plan opinion incorporates the Staff's recommendation and Staff Report, including any relevant information relied on by the Board in arriving at its decision.

C. Site Plan

Site Plans, if required by the zone in which development is proposed, are the final level of regulatory review (excluding record plats). All proposed developments that are required to undergo project plan review must undergo subsequent site plan review, which is governed by Division 59-D-3 of the Montgomery County Code.<sup>9</sup> (Copy attached). The Zoning Ordinance provides that site plan review involves a more detailed review of many of the elements previously reviewed and approved by the Board at the project plan stage.

The Zoning Ordinance includes an express requirement that the Planning Board, following its action after the public hearing on an application, "must notify the applicant in writing of its action." Montgomery County Code § 59-D-3.4(a) (Action by the Planning Board) (emphasis added). A Site Plan Opinion includes the statutory findings that the Board is required to make in approving a project plan, which findings are listed in Code § 59-D-3.4(a)(1)-(5). Among the determinations that the Board is required to make in reaching its decision on a site plan application is that "the site plan is consistent with . . . a project plan for the optional method of development, if required[.]" Montgomery County Code § 59-D-3.4(a)(1) (emphasis added).

In contrast to the division of the Zoning Ordinance governing project plan review, Division 59-D-3 of the Zoning Ordinance contains very specific direction concerning the disposition of the site plan drawing following approval, requiring that,

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<sup>9</sup> See Montgomery County Code § 59-D-2.11 (stating that, for those projects required to undergo project plan review, "a site plan must be approved in accordance with the requirements of division 59-D-3 prior to the issuance of any building permit."); see also § 59-D-2.8 ("Site Plans shall be submitted and reviewed in accordance with the provisions of division 59-D-3").



[u]pon approval, the site plan must be:

- (1) Signed by the applicant agreeing to execute all the features and requirements that are part of the site plan;
- (2) Signed by the chairman of the Planning Board, or his designee, certifying Planning Board approval of the site plan; and
- (3) Forwarded to the Department [of Permitting Services] for reference in issuing building permits under Section 59-D-3.5.<sup>10</sup>

Montgomery County Code § 59-D-3.4(c) (emphasis added).

D. Relationship/Authority of Various Approvals

Designation of height on a site plan opinion or drawing controls over a conflicting height delineation in a project plan opinion or drawing or a preliminary plan opinion or drawing because the site plan approval, as discussed above, is later in time, includes an express finding of consistency with the project plan,<sup>11</sup> and is a more detailed review of a proposed development.

As discussed above, site plan approvals are required by statute to be consistent with project plan approvals. See Montgomery County Code § 59-D-3.4(a)(1). Consistency does not require that the approvals be identical in every respect and, in fact, variation is to be expected because, as discussed above, the Zoning Ordinance anticipates a more detailed level of review at site plan.

7. **Authority for minor amendments to regulatory approvals.** What State and County laws, regulations, or other governing documents delegate to the Planning staff the authority to make minor amendments to approved plans? How does the law define a minor amendment, and what types of actions does this delegation allow? Did the adoption of the RMX zone expand the staff's authority in any way? What is the relationship between this authority to exercise staff discretion and condition 38, which was included in the Planning Board Opinion for the Clarksburg Town Center Site Plan #8-98001? Did the Board act appropriately in adopting condition

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<sup>10</sup> In relevant part, Montgomery County Code § 59-D-3.5 (Effect of site plan) provides that "[n]o . . . building permit . . . may be issued unless it is in strict compliance with an approved site plan." (emphasis added).

<sup>11</sup> See Montgomery County Code § 59-D-3.4(a)(1).

#38, or should it have proposed a zoning text amendment or addressed this need for flexibility some other way?

**Response:** Section 59-D-3.7 of the Code governs “Amendment of a site plan” and states, in full, that “A major plan amendment or minor plan amendment is defined as set forth in Sec. 59-D-2.6.”

Section 59-D-2.6 states, in full, as follows:

(a) Minor Plan Amendment

- (1) A minor amendment is an amendment or revision to a plan or any findings, conclusions, or conditions associated with the plan that does not entail matters that are fundamental determinations assigned to the Planning Board. A minor amendment is an amendment that does not alter the intent, objectives, or requirements expressed or imposed by the Planning Board in its review of the plan. A minor amendment may be approved, in writing, by the Planning Board staff. Such amendments are deemed to be administrative in nature and concern only matters that are not in conflict with the Board’s prior action.
- (2) No action taken by the staff on a request for a minor plan amendment can alter in any manner the validity period previously established by the Planning Board.

(b) Major Plan Amendment

- (1) Any action taken by the Planning Board to amend or revise a previously approved plan, whether such amendment is limited or comprehensive in scope, will be considered a major plan amendment.
- (2) The Planning Board will determine, on a case by case basis, whether the validity period should be extended and, if so, for what duration. In making such determination, the Board must consider the nature and scope of the requested amendment.

Thus, under the Code provisions, staff can approve a minor plan amendment if the proposed amendment does not entail “matters that are fundamental determinations assigned to the Planning Board” and “does not alter the intent, objectives, or requirements expressed or imposed by

the Planning Board in its review of the plan.” All other amendments must be approved by the Planning Board and are considered major plan amendments.

The RMX zone does not amend the site plan amendment procedures.

Condition No. 38 as set forth in the Planning Board’s Opinion for the Clarksburg Town Center Site Plan No. 8-98001 provides, in full, as follows:

The applicant may propose compatible changes to the units proposed, as market conditions may change, provided the fundamental findings of the Planning Board remain intact and in order to meet the Project Plan and Site Plan findings. Consideration shall be given to building type and location, open space, recreation and pedestrian and vehicular circulation, adequacy of parking etc. for staff review and approval.

Whether the amendments approved by staff fall under this provision or the minor amendment provision set forth in Zoning Ordinance as quoted above, is part of the determination to be made by the Planning Board in September, 2005.